



Memorandum

To : Mr. [redacted]

Date: April 29, 1999

From : [redacted] MAF

Subject: Review of Proposed Second Notice Denying Welfare Exemption Claim of Low-Income Housing Claimant, [redacted] County, for 1998-99

This memo is in response to your request for a review of the claim for exemption of [redacted], for an 80-unit multifamily apartment complex, [redacted] Apartments, located in the City of [redacted]. The exemption staff issued findings on January 21, 1999, which denied [redacted]'s request for exemption on several grounds. Claimant submitted additional information which has resolved all but two issues: (1) the limited partnership agreement does not indicate that the non-profit managing general partner, [redacted], has any exclusive management duties commensurate with those of a managing general partner; and (2) the amended and restated limited partnership agreement is effective after the property acquisition. As will be discussed herein, a second notice should be issued to notify claimant that the property has not met the requirements for exemption, (1) above.

I. Whether the nonprofit managing general partner has any exclusive management duties as required by section 214, subd. (g)?

Section 214, subd. (g) provides exemption for property used to provide low-income housing and related facilities owned and operated by qualified nonprofit organizations, "or corporations, including limited partnerships in which the managing general partner is an eligible nonprofit corporation meeting all the requirements of this section..." Thus, the express language of this provision requires an eligible nonprofit corporation to function as the managing general partner, which may be interpreted to mean the sole managing general partner. However, the Board and Board staff have interpreted this provision to permit more than one managing general partner, provided the eligible nonprofit corporation has at least some exclusive substantial and separate partnership management duties and responsibilities, with particular attention focused on "which decisions are reserved for the managing general partner, other general partners and the partnership as a whole."¹

¹ Assessors Handbook Section 267, Welfare, Church and Religious Exemptions, page 67.

The Board's view that a limited partnership may have multiple general partners, hence also multiple managing general partners, is supported by the following. The definition of a limited partnership in Corporations Code §15611, subd. (r) states "Limited partnership...means a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners." The California Revised Limited Partnership Act, (hereinafter CRLPA, Corp. Code §§15611 et seq.) governs limited partnerships, prescribing the rights, powers, duties and liabilities of limited partners and general partners.² To the extent that the CRLPA has not provided for a particular matter, limited partnerships are governed by the provisions of the Uniform Partnership Act.³ Corp. Code section 15643 provides the authority for a general partner to manage the business of the limited partner, indicating that a general partner of a limited partnership has the same rights, powers, duties and liabilities of a general partner of a general partnership, subject, of course, to express limitations on the authority of a general partner imposed by the limited partnership agreement.

As indicated above, section 214, subd. (g) states that the welfare exemption is available to a limited partnership "in which the managing general partner is an eligible nonprofit corporation, meeting all the requirements of this section..." The CRLPA does not define "managing general partner," however, Blacks Law Dictionary states that "general partner" may also be the managing partner of a limited partnership who is responsible for the operations of the partnership.⁴ Manager is defined as "a person chosen or appointed to manage, direct, administer the affairs of a business. The designation of manager implies general power and permits reasonable inference that the person so designated is invested with the general conduct and control of...[the] business."⁵ Thus, the term, "managing general partner" can reasonably be construed to mean a general partner, authorized by the limited partnership agreement to direct, conduct or control the business of the limited partnership. Such general partner would possess all the statutory powers authorized to a general partner, except those expressly limited or eliminated by the provisions of the limited

²The limited partners do not participate in management except for specified voting rights and generally are not liable to third party creditors beyond the amount of their capital contributions. (Corp. Code § 15632, subd. (a).) However, recent legislative enactments to the CRLPA allow a limited partner to participate in partnership management to a considerable extent without losing limited liability. (See Corp. Code § 15632, subd. (b)(1) - (13). See also Advising California Partnerships, 2nd Ed., CEB, sections 5.104 and 5.4.)

³As of January 1, 1999, all general partnerships became subject to Uniform Partnership Act (Corp. Code § 16100 - 16962) enacted in 1996, irrespective of when formed.

⁴Black's Law Dictionary, 6th Edition, page 685.

⁵Black's Law Dictionary, see page 960.

partnership agreement. Those powers may include, subject to the applicable rights of the Limited Partners, the right to:

- acquire, hold and dispose of property or any interest in property
- borrow money on behalf of the partnership, encumber partnership assets, or place title in the name of a nominee for the purpose of obtaining financing
- prepay in whole or in part, refinance, increase, modify or extend any obligation
- manage the property and employ and supervise a property manager
- employ from time to time at partnership expense, building management agents, other on-site personnel, insurance, brokers, real estate brokers, loan brokers, consultants, accountants and attorneys
- determine the amount and timing of distributions
- open and maintain partnership bank accounts
- pay all organization expenses incurred in the creation of the partnership, and all operation expenses incurred in the operation of the partnership
- cause the partnership to enter other partnerships as a general or limited partner and exercise the authority and perform the duties required of the partnership as a partner in any other partnership.

The CEB publication, Advising California Partnerships (2nd Ed.), indicates that the above-stated provisions are common practice in limited partnership agreements, although adequate authority to run the business is granted by Corp. Code § 15643. The CEB text offers the following comment characterizing the control of a general manager of a limited partnership: "The general partner manages the limited partnership much as a board of directors and officers are responsible for the management of a corporation."

As a limited partnership may have multiple general partners and as partners may decide among themselves which general partners will have which duties and responsibilities, the Board and Board staff have accepted one or more managing general partners if the nonprofit corporation has some exclusive substantial and separate management duties and responsibilities, as indicated on page 2.

The Welfare, Church and Religious Exemptions Handbook goes on to say that "The managing general partner's responsibilities and duties, as stated in the limited partnership agreement, must reflect that it is, in fact, managing the partnership. For example, if the managing general partner's sole duty is to maintain its status as a tax-exempt nonprofit organization under federal law, (IRC, section 501(c)(3), the organization does not meet the managing general partner requirement due to an absence of management responsibilities and duties." (See Handbook, page 67)

M , a nonprofit corporation, is the managing general partner of Limited Partnership,⁶ and A Inc., is the administrative general partner, pursuant to an amended restated limited partnership agreement effective July 1, 1998. The property for which exemption is claimed was acquired by a deed which was recorded on June 30, 1998. In Article II, Defined Terms, of the limited partnership agreement, "general partner" or "general partners" means collectively A as administrative general partner, and M as Managing General Partner and any other person admitted as General partner pursuant to this agreement..." The limited partnership agreement states in relevant part in section 8.01(a), Management of the Partnership, that "the General Partner(s) acting unanimously within the authority granted to them... shall have full, complete and exclusive discretion to manage and control the business of the partnership...and shall make all the decisions affecting the partnership and shall manage and control the affairs of the partnership...." (emphasis added)

Further, the limited partnership agreement provides that should a "substitute general partner" be appointed, "such person shall have the right, acting alone and without the consent or approval of any other general partner, to take action or make any decision authorized under this Agreement to be taken or made by a general partner and no other general partner shall have any power or right to act alone." (Section 8.01(b) of Article VIII, page 50.) Before this could occur, however, M and A would have to unanimously agree to the substitute general partner.

These provisions clearly indicate that the general partners, M and A , must act unanimously to manage the Limited Partnership. As such, there are no exclusive partnership management duties and/or responsibilities reserved solely for M , managing general partner, as required by section 214. M does not have authority to make independent decisions commensurate with its role as the "managing general partner." Only a substitute general partner would be authorized to make management decisions without the consent of other general partner(s).

⁶On January 23, 1998, an agreement of limited partnership was executed between M , A and J S as limited partner, and was amended and restated effective July 1, 1998, to permit the withdrawal of Mr. S and to add L , Inc., and L Fund VIII, L.P. as the limited partners.

In correspondence dated February 26, 1998, Mr. , Executive Director of M , asserts that the provisions of the limited partnership agreement in conjunction with the Incentive Partnership Management Fee Agreement meet the Handbook's requirement that the nonprofit have authority over some aspect of the Limited Partnership's general operations.

Mr. states that sections 8.01 (a) and (b) of the limited partnership agreement grant the general partners collectively the authority to manage the Limited Partnership. Thus, Mr. 's interpretation of the agreement is consistent with our interpretation that all management decisions made by the managing nonprofit general partner must be approved by the Administrative General Partner and vice-versa, that M has no exclusive limited partnership management duties and/or responsibilities

Mr. also states that section 8.01(c) of the limited partnership agreement modifies sections 8.01 (a) and (b) to provide the required management authority to M with the following language:

"Notwithstanding any provision of this Agreement to the contrary, ...the Managing General Partner shall take such actions as are required in order to qualify as a managing general partner under section 214.... This section is intended to delegate to the Managing General Partner whatever authority is required for it to be the managing general partner of the Partnership for purposes of section 214..."

In our view, this assertion is without merit because the quoted provisions of section 8.01(c) are vague, therefore unenforceable by the parties to this agreement, and can be considered no more than a statement of intent. More importantly, as indicated on page 2 above, if the managing general partner's sole duty is to maintain its status as a tax-exempt organization, the organization does not meet the managing general requirement due to the absence of partnership management duties and responsibilities. (see Handbook, page 67)

As Mr. indicates, Section 8.11 provides that M is to be paid an incentive partnership management fee for specified management services including administering and directing the business of the Limited Partnership, maintaining appropriate books and records relating to financial affairs of the partnership, and control of bank accounts and partnership funds. However, the Incentive Partnership Management Fee Agreement states that the authority and obligation of the managing general partner is in conformity with the provisions of the limited partnership agreement and subject to such provisions. Accordingly, the Incentive Partnership Management Fee Agreement must be interpreted consistent with the limited partnership agreement to mean that M the nonprofit general manager, is to be paid for the specified services it and A , the other general partner, have unanimously agreed to undertake or authorize.

Neither sections 8.01(c) nor 8.11 of the limited partnership agreement, nor the provisions of the Incentive Partnership Management Fee Agreement, contradict the stated limitation of sections 8.01(a) and (b) of the limited partnership agreement that M as managing general partner, must act unanimously with the administrative general partner, and, thus lacks any right or power to act alone.

II. Whether the June 30, 1998, property acquisition, which is one day prior to the effective date of the amended and restated limited partnership agreement, results in ineligibility of the property for 1998?

Exemption staff have indicated to the claimant that the amended and restated limited partnership agreement is effective July 1, 1998, one day after the acquisition of the property on June 30, 1998. They assert that the property would be ineligible for exemption for 1998 since the Limited Partnership was not in existence when the property was purchased. However, the initial limited partnership agreement was effective as of January 23, 1998, the date the agreement was filed with the office of the Secretary of State,⁷ and had M and A as its general partners. The agreement was subsequently amended and restated, effective July 1, 1998, for purposes of substituting two limited partners, L Inc., and L

Fund VIII, L.P. for the initial limited partner, J S.⁸ California law allows the admission or withdrawal of limited partners without causing dissolution of the partnership if the limited partnership agreement makes such provision. (Corp. Code § 15031, subd. (a)(7), See also Ballentine & Sterling California Corporation Laws, 4th Ed., Vol. 4, section 714.03) The Limited Partnership was formed on the date of filing of the certificate of limited partnership in the office of the Secretary of State, January 23, 1998, approximately six months prior to the property acquisition, and it continued to exist at the time of the property acquisition with the same general partners. As such, the property would not be disqualified from exemption on the basis that the Limited Partnership did not exist as of the acquisition date of the property.

⁷Corporations Code §15621(b) provides that a limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State; thus, a copy of the certificate is conclusive evidence of the formation of a limited partnership and prima facie evidence of its existence. (Corporation Code §15621(c).)

⁸ The use of an initial limited partner simplifies formation and organization of a partnership when an agreement must be executed before all the limited partners have joined the partnership. See Advising California Partnerships, § 548, 2nd Ed. 1988) CEB (California Continuing Education of the Bar)

In conclusion, Mr. has indicated that he intends to challenge the Board's finding of ineligibility and has requested a hearing on the denial of its claim for exemption in his correspondence of February 26, 1999. Such is premature, however, and Mr. must follow the Second Notice instructions as to any appeal of the staff's findings.

MAA:jd

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